Supreme Court, U.S.
FILED

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DAVID H. DEIBLER and CARRIE J. DEIBLER,

PETITIONERS

vs.

ATLANTIC PROPERTIES GROUP, INC., and THE DINNER BELL INN, INC.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the petitioners were deprived of due process of law when their stock in certain corporations was exposed for sale by a Sheriff at public sale without first notifying potential buyers regarding the particulars of the corporations in sufficient detail so as to apprise a potential buyer of the worth of the stock.

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REPORTED OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

None.

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

A. Date of the entry of the judgment sought to be reviewed:

January 11, 1995.

B. Date of the order refusing a rehearing:

February 10, 1995.

C. Statutory provision conferring jurisdiction on the Supreme Court of the United States:

Title 28 United States Code,

Section 1257(a)

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

Constitution of the United States, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers,

counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts

incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONCISE STATEMENT OF THE CASE

PROCEDURAL HISTORY

On July 30, 1993, a Sheriff's Sale took place in Georgetown, Delaware, of the stock of three corporations owned by David H. Deibler and Carrie J. Deibler ("Deibler"). The three corporations whose stock was sold were: (1) The Olde Dinner Bell Inn, Inc., ("DBI"), (b) Coastal Resort Properties, Inc. ("CRP"), (c) Distance Horizon Dream, Inc. ("DHD"). On August 12, 1993, Deibler filed in the Court of Chancery in New Castle County, an action against the successful bidder, Atlantic Properties Group, Inc. ("Atlantic") seeking a temporary restraining order and a declaration that the sale of July 30, 1993 was null, void, and of no effect. *David H. Deibler and*

Carrie J. Deibler v. Atlantic Properties Group, Inc., C.A. No. 13074. An answer was timely filed. As the result of a teleconference with the Honorable Carolyn Berger and agreement among the parties, the request for a temporary restraining order was withdrawn.

As the result of hearings in a parallel case, *Prickett, Jones, Elliott, Kristol & Schnee, P.C. v. David H. Deibler, et ux.*, C.A. Nos. 92J-11-054, 92J-11-055, 92J-11-056, the Honorable T. Henley Graves decided, without opinion, that he retained jurisdiction through the inherent powers of the Superior Court to monitor and ultimately decide on the propriety of sales of personalty which were conducted under the aegis of a Superior Court order.

On November 1, 1993, an action was commenced by Atlantic and DBI against Deibler entitled, *Complaint and Petition for Rule to Show Cause in the application for Writ of Possession,* in order to bring the issue of the validity of the July 30, 1993 sale to the Court for resolution. Hearing was held before the Honorable T. Henley Graves on December 30, 1993 and January 4, 1994. After close of testimony, but before rendering his oral decision, the Honorable T. Henley Graves initiated a teleconference between himself and counsel for the parties and requested that counsel for Atlantic in his capacity as counsel for Guardian Capital Corp.[1] to agree not to pursue

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[1] A corporation with the same ownership as Atlantic, but not a party to the

Deibler with regard to a deficiency judgment. Later that day and prior to decision, counsel for Atlantic faxed to the Court a letter agreeing not to pursue the deficiency judgment. The teleconference was initiated *sua sponte* by the Court without request or motion of either party. Thereafter, in the afternoon of January 5, 1994, because of the pendency of other foreclosure actions involving related parties, the Court orally advised the parties through their counsel of his decision sustaining the sales and granting a Writ of Possession. On January 6, 1994, the written decision and order of the Court was entered, and on January 7, 1994, the Writ of Possession was entered. On February 3,

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litigation.

1994, a timely appeal was taken from the oral decision and order of January 5, 1994, the written decision and order of January 6, 1994, and the order granting Writ of Possession dated January 7, 1994.

FACTUAL HISTORY

The events and circumstances which culminated in the sale of the stock of three Deibler-owned corporations, DBI, CRP and DHD is tortuous and convoluted, both factually and legally. For present purposes, it is sufficient to say that by the spring of 993, Prickett, Jones, Elliott, Kristol and Schnee ("PJEKS"), Deibler's former attorneys in several bankruptcies, had withdrawn as counsel and had transferred to Sussex County as a

judgment, their fee award from the Bankruptcy Court. Having gained intimate knowledge of the Deibler's financial affairs through their former representation, PJEKS was able to formulate a plan of execution against the Deibler assets to obtain payment of their fees. With knowledge of the corporate structure as well as the assets of each of the Deibler corporations, PJEKS directed the Sheriff to levy on the stock of DBI, CRP, and DHD corporations owned by the Deiblers. PJEKS was aware that it had to move quickly in order to execute and sell prior to the Deiblers' filing for bankruptcy to protect the assets. PJEKS was aware that Deibler was prohibited from filing for bankruptcy prior to August 5, 1993, since they had been instrumental in obtaining a

dismissal of their former client's bankruptcy earlier that year.

As the result of their representation of Deibler in his bankruptcy, PJEKS was also aware that the major creditor with whom Deibler was dealing was Guardian Capital Corp., to whom the Deiblers owned in excess of $700,000.00 resulting from a deficiency judgment obtained from the sale of other Deibler assets.[2] Realizing that its interest could best be served by cooperation with Guardian Capital Corp., PJEKS began a series of negotiations with Ronald B. Hirsch ("Hirsch"), a principal

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[2] Deibler has questioned the propriety and amount of the deficiency judgment, which is part of the earlier history of these parties, but is not relevant for the issues presently before the Court.

of Guardian and, in effect, the Chief Operating Officer (A-5,6).

To facilitate bidding and ownership of assets Hirsch, on behalf of the owners of Guardian, created Atlantic (A-). On July 2, 1993, the Court entered an order scheduling the sale of stock for July 30, 1993 (A-5,6). The Court rejected the Deibler's request for a) additional time for advertising, b) a staged sale of the stock and c) that, since the assets of the corporation were essentially real estate, the same rules and parameters for advertising and notice be used for the sale of the stock as would be for the sale of real property.

The sale bills were prepared and the minimum posting required pursuant to 10 Del.C. §4972 was accomplished. The sale bills provided no information other than

that the following goods and chattels would be subject to sale:

100 Shares of Stock - Distant Horizon Dream, Inc.

100 Shares of Stock - The Olde Dinner Bell Inn, Inc.

10 Shares of Stock - Coastal Resort Properties, Inc.

(A-66)

Conspicuously absent was any reference to the underlying assets of any of the corporations, including the significant real estate owned by each. Additionally, there is no reference to the percentage ownership represented by the said stock being sold, or of any individuals to contact in the event of any questions. In short, there is little to pique the curiosity of even the most ardent investor.

On the day before and morning of the sale, it had become obvious to all involved that Deibler, in an attempt to salvage something from a lifetime of hard work, had attempted to thwart what he perceived to be an unfair and unforgiving system. Based upon what he perceived to be good legal advice, but which if given was certainly wrong, and potentially criminal, Deibler attempted to strip the corporations of their assets, and in fact, dissolved DBI and DHD (A-55). The Court, expressing a continuation of the anger that he had towards Mr. Deibler, directed him to undo that which he had done, in terms of dissolution and liquidation of assets. Under a threat of at a minimum of finding Mr. Deibler guilty of limit contempt with incarceration until the contempt was

purged, and at worst, a referral to the Attorney General's office for criminal prosecution under 11 Del.C. §863, Interference with Levied-on Goods, the Court left no doubt that it considered the liquidations and dissolutions of no force and effect. (A-) Although the actual documents were not executed until later, the final document being the certificate of correction, the certificate of dissolution of Coastal Resort Properties, Inc. was not filed until January 27, 1994. (A-95) Deibler, as well as all parties involved, were aware that the sale of the stock to be held on July 30, 1993 was of the actual corporation, and of their assets. If that were not so, then the sale could be of no force and effect since as of the moment of the sale, the corporations in which

the stock was being sold were in fact dissolved.

The hearings on December 30, 1993 and January 4, 1994 were to a large extent for the presentation of appraisal testimony. John J. Mattey ("Mattey") testified on behalf of Deibler as to the fair market value of the 1.51+ total acres of land and improvements, personalty and good will, if any, in the "business enterprise" known as The Dinner Bell Inn. Mattey concluded that the fair market value in total was $2,970,000.00. (A-109) Mattey personally inspected the subject property and based upon the actual physical inspection, which included use of the tape measure to determine square footage of the various parts of The Dinner Bell and concluded that the useable restaurant square

footage was 10,090 square feet. (A-) There was no dispute between Mattey and Philip J. McGinnis ("McGinnis") that the highest and best use of the land and improvements of The Dinner Bell Inn were for its present use. (A-28A, 38) Mattey gave greatest emphasis to the sales comparison approach, and confirmed that with its replacement cost approved. (A-109, 110) Mattey chose not to use the income approach since he believed that the numbers which were generated by the use of the financial statements of the DBI resulted in conclusions inconsistent with reality. (A-288)

Because of the dearth of the sales in the Rehobeth Beach area, as well as the great sensitivity to land values that results from the location of property in resort areas, it was difficult to

conclude land values. While in one sense all land sales and all land are comparable to others, the determination for the appraiser is to find highly comparable properties upon which to base his conclusions. (A-28C, 29) The choice of comparable sales by Mattey reflects the unique nature of resort property. The conclusion of value arrived at by the comparable sale method was corroborated by the cost estimate. An integral part of the cost method, however, does include a calculation of land value.

Mattey thereafter analyzed an array of restaurants and motels to determine value for these entities. A-29) Again, because of the dearth of sales, it was difficult to obtain highly comparable comparisons. Nonetheless, as the result of analysis, Mattey concluded that the

value of The Olde Dinner Bell Inn, Inc. as a going business was $2,970,000.00 (A-31) Mattey thereafter opined on the value of the stock of DBI and concluded that, taking into account all the known existing obligations and adding in an additional amount for contingency, the net value of stock was $1,896,003.53, or $3,792.007 per issued share. (A-33)

By contrast, Philip J. McGinnis ("McGinnis") testified on behalf of Atlantic. McGinnis acknowledged that it was not he, but rather a "staff appraiser", Charles H. Darrell, who "did the inspection and did most of the research finding the comparables, verifying sales and leases, and so forth drafted the reports." (A-37) In fact, the cover page of the appraisal indicates that it was prepared by Charles H.

Darrell ("Darrell") and the certificate of value was signed by Darrell. (A-67-69) Interestingly, there is nothing in the appraisal as filed nor in the testimony of McGinnis that speaks of the qualifications of Darrell. Neither Darrell nor McGinnis did a physical inspection of the interior of the property, nor did they consult building plans or talk with Mr. Deibler in coming to their conclusions as to the subject property. This is most important because McGinnis concluded that the most accurate method of determining value was using an incoming approach based upon other properties experiences based on a square foot basis (A-41A, B)

McGinnis initially concluded, based upon the income approach as confirmed by his comparable sales and cost

calculations, that the market fair value of DBI was $1,450,000.00. (A-42) After direct examination, during a luncheon break but before cross-examination began, McGinnis realized that the appraisal contained significant mathematical errors resulting in an increased value for DBI to $1,686,000.00. (A-31) McGinnis' entire income approach to the restaurant is based upon square footage which he concluded was 6,435 square feet. (A-45) From his testimony, it is clear that McGinnis had no idea of the physical layout of the Dinner Bell, the number of dining rooms, or even whether there was a cocktail lounge. (A-46) By his own admission, he excluded the "Crab Deck" as well as the interior patio / courtyard. (A-47) McGinnis acknowledged that his sole information as to the square footage

of the restaurant came from the property card at the land records of the county, (A-33A) but agreed that if there was a discrepancy of the overall size of the Dinner Bell Restaurant his income number would be incorrect. (A-34) Both Mattey and Deibler testified that the square footage of the Dinner Bell Restaurant was significantly greater than the number used by McGinnis. (A-30, 60, 54) Mattey thereafter went through the mathematical calculation of the value of DBI. Although not agreeing with McGinnis' numbers of premises, (a-61, 63) Mattey concluded that using McGinnis' analysis, the value of DBI would be $2,048,612.00. (A-63)

The $10.00 per square foot used by McGinnis was obtained by the use of four comparable sales. (A-39) Analysis of those sales showed that none of them are

highly comparable to the Dinner Bell. Three of the comparables are grouped on Rehobeth Avenue, a minimum of five to six blocks from the beach. (A-49) The first was a Sheriff's sale, the third and fourth comparables were effectively bars, with limited restaurant facilities. (A-49) The fourth comparable was on Route 1, approximately two miles from the beach. (A-71)

The assets of Coastal Resort Properties Inc. were a single family older two-story home at 5 Maryland Avenue, which was in need of renovation or remodeling, and 7 Maryland Avenue, composed of four condominium units with a fifth potential unit in the rear. Robert Kaufman ("Kaufman") appraised the properties for Deibler, using the comparable sales approach. Kaufman

compared 5 Maryland Avenue to three properties that were highly comparable to the subject property. (A-35) Kaufman estimated that the fair market value of the subject property was $250,000.00. (A-36) Mr. Kaufman similarly analyzed the condominia located at 7 Maryland Avenue and compared the subject property to three highly comparable condominia. Kaufman adjusted for the most important single consideration for resort property, which is locating, as well as for size and condition. Kaufman estimated the fair market value of each of the four main condominia at 7 Maryland Avenue to be $165,000.00. After considerable testimony as to the fifth unit, which Kaufman originally valued at $125,000.00, he concluded during his testimony that the value was excessive based upon a

potential problem as to its use, and the potential cost of building the property to city specifications. (A-36A)

These properties were also appraised by McGinnis on behalf of Atlantic. Kaufman also compared the subject property to three comparables. As can be seen from the map showing the location of the comparables, none of them were near the beach. (A-36B & C) Notwithstanding, McGinnis made no adjustment for location and concluded that the fair market value for 5 Maryland Avenue was $203,500.00. Similarly, for 7 Maryland Avenue, McGinnis compared the subject property with three comparables. Again, McGinnis made no adjustment for location, and no adjustment for the fact that the subject property had been remodeled within the last two to three years. McGinnis did

make adjustments, however, varying between $4,000.00 and $7,500.00 per unit for inferior construction, and in two instances for either ocean front or ocean view. (A-44) Upon examination, however, McGinnis acknowledged in his analysis of 5 Maryland Avenue, that in a resort property location is the primary and most important aspect of price. (A-50) McGinnis acknowledged that in each instance where he had failed to make a location adjustment, in fact location adjustment should have been made. (A-51) In his analysis, McGinnis had concluded that his second comparable was the comparable he used to base his conclusion of fair market value. (A-43) He then agreed that his conclusion of value was incorrect, because he should have taken a location adjustment to reflect a

difference in the value of the property for the subject. (A-52) The two comparable sales that were in the beach block were in each instance located on the fifth floor of high-rise condominia. Although McGinnis took significant adjustments with regard to view, in his testimony he indicated that the sole basis for the determination was that the multilist indicated that there was ocean view, but that he himself could not testify as to where in the building the condominiums were located. (A-58)

RAISING OF FEDERAL QUESTIONS

IN THE STATE COURTS

The Federal Constitutional issues were briefed and argued before the Supreme Court of Delaware.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

The petitioners were deprived of due process of law when their stock in certain corporations was exposed by a Sheriff at public sale without first notifying potential buyers regarding the particulars of the corporations in sufficient detail so as to apprise a potential buyer of the worth of the stock.

Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of

the Due Process Clause of the Fifth and Fourteenth Amendments. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert v. California*, 355 U.S. 225, 228. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.

Anderson National Bank v. Luckett, 321 U.S. 233, 246 (1944). *Grannis v. Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Griffin v. Griffin*, 327 U.S. 22; *Covey v. Town of Somers*, 351 U.S. 141; *Walker v. Hutchinson City*, 352 U.S. 112; *Schroeder v. City of New York*, 371 U.S. 208. "The means employed must be such as one desirous of actually informing the [opposing party] might reasonably adopt to accomplish it."

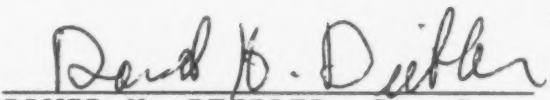
Mullane v. Central Hanover Tr. Co., 339 U.S., at 315.

We respectfully submit that the egregious injustice done to Mr. and Mrs. Deibert shocks the conscience and has offended the minimal standards of due process which the Fifth and Fourteenth Amendments guarantee. For this reason, we urge that your Honorable Court grant a Writ of Certiorari.

CONCLUSION

For the reasons set forth above, it is prayed that your Honorable Court grant a Writ of Certiorari.

RESPECTFULLY SUBMITTED,



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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID H. DEIBLER and CARRIE J. DEIBLER Defendants Below, Appellants, v. ATLANTIC PROPERTIES GROUP, INC., a corporation of the State of Delaware and THE OLDE DINNER BELL INN, INC., a corporation of the State of Delaware, Plaintiffs Below, Appellees.	§	No. 42, 1994 Court Below: Superior Court of the State of Delaware in and for Sussex County C.A.No.93M-11-001

Submitted: February 2, 1995

Decided: February 10, 1995

Before VEASEY, Chief Justice, WALSH, Justice, and ALLEN, Chancellor.*

O R D E R

This 10th day of February 1995, the Court having considered the Motion for Reargument filed by the appellant pursuant to Supreme Court Rule 18 and it appearing that the motion presents no ground justifying further consideration of this appeal,

NOW, THEREFORE, IT IS ORDERED that the appellant's motion be, and the same hereby is,

DENIED.

BY THE COURT:

/s/ Allen, Chancellor

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*Sitting by designation pursuant to Del. Const. art. IV, §12 and Supreme Court Rule 2.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID H. DEIBLER and CARRIE J. DEIBLER Defendants Below, Appellants, v. ATLANTIC PROPERTIES GROUP, INC., a corporation of the State of Delaware and THE OLDE DINNER BELL INN, INC., a corporation of the State of Delaware, Plaintiffs Below, Appellees.	§	No. 42, 1994 Court Below: Superior Court of the State of Delaware in and for Sussex County C.A.No.93M-11-001

Submitted: November 29, 1994

Decided: January 11, 1995

Upon appeal from the Superior Court.

AFFIRMED.

Before VEASEY, Chief Justice, WALSH, Justice, and ALLEN, Chancellor.*

Henry A. Heiman, Esquire, Heiman, Aber & Goldlust, Wilmington, Delaware, for Defendants.

George F. Gardner, III, Esquire, Parkowski, Noble & Guerke, Dover, Delaware, for Plaintiffs.

ALLEN, Chancellor

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*Sitting pursuant to Supreme Court Rule 2(a) and Article IV, §12 of the Delaware Constitution.

This appeal is from an order of the Superior Court issuing a writ of possession to appellee Atlantic Properties Group, Inc. ("Atlantic"). The real property in question is operated as the Olde Dinner Bell Inn in Rehobeth Beach Delaware; it constitutes substantially all of the assets of a Delaware corporation, The Olde Dinner Bell Inn, Inc. ("Dinner Bell, Inc."). Atlantic's right to the writ of possession arises from its purchase at a 1993 sheriff's sale of all of the issued and outstanding shares of capital stock of Dinner Bell, Inc. The sheriff's sale was ordered as part of the execution of a judgment obtained by the law firm Prickett, Jones, Elliott, Kristol & Schnee (the "Prickett Firm") against that firm's former clients, David H. and

Carrie J. Deibler (the "Deiblers"), who had owned all of the outstanding capital stock of that corporation and two others. At the sale itself an exceedingly small amount was obtained when the true value of the property in issue is considered. Nevertheless, after taking evidence at a contested hearing, the Superior Court confirmed the sale and enforced it by issuing the writ of possession.

The Deiblers have appealed the granting of the writ, asserting that the sheriff's sale process was fatally defective in several respects. Moreover they claim that the amount realized by the sale was itself such as to compel the conclusion that the Superior Court abused its discretion in failing to require that the property go through another sale process. For the reasons set forth

below, we conclude that the sale process fully complied with the requirements of law and that, in all events, the Deiblers have no standing to complain about the amount realized from the sale, as they deliberately attempted to subvert the judicial process and that attempt contributed to the outcome of the sale. We thus affirm the judgment of the Superior Court.

I.

For purposes of this appeal a brief outline of the facts will suffice. In November 1992 the Prickett firm obtained a judgment against the Deiblers in the sum of $121,250.08. Discovery in aid of execution uncovered the fact that the Deiblers owned stock in three Delaware corporations. Distant Horizon Dream,

Inc. ("Distant Horizon"), Coastal Resort Properties, Inc. ("Coastal") and Dinner Bell, Inc. Following attachment of the Deiblers' stock of these corporations, on July 2, 1993 the Superior Court entered an order for the sale of 500 shares of Dinner Bell, Inc. stock, and ten shares of Coastal stock. The sale was scheduled for July 30, 1993. On July 2, 1993, the Superior Court considered and rejected a request by the Deiblers that the notice of public sale required by Section 4972 of Title 10 be distributed or published more broadly than that statute provides. The court instructed the Deiblers that they were free to engage in wider or different advertisement of the forthcoming sale if they thought it beneficial. The notice of public sale that was employed was skeletal. It

identified the property to be sold as "100 Shares of Stock-Distant Horizon Dream, Inc."; "500 Shares of Stock-The Olde Dinner Bell Inn, Inc."; and "10 Shares of Stock-Coastal Resort Properties, Inc." No description of the number of authorized and outstanding shares of any of these corporations was set forth, nor were assets and liabilities summarized. It was stated that the property was "the property of David H. Deibler and Carrie J. Deibler."

Shortly before the sale was to occur, and despite the attachment of the stock, the Deiblers purported to dissolve all three corporations by filing certificates of dissolution with the Secretary of State and purported to deed to themselves the real estate that

constituted the principal assets of Dinner Bell, Inc. and Coastal. This maneuver was discovered at the last moment by the Prickett firm who brought the matter before the Honorable T. Henley Graves, the judicial officer who had entered the sale order. In a conference telephone call the day before the sale Judge Graves orally instructed the Deiblers to reverse the steps that they had purported to take. The Deiblers did not, however, attempt to do so promptly. At the sheriff's sale, according to the opinion below, which is not challenged in this respect, "the sale proceeded, but the Deiblers made the decision not to reverse the dissolutions and not to convey the real property back to the respective corporations. This was announced at the sale." *Atlantic*

Properties Group, Inc. v. Deibler, C. A. 93M-11-001 (Graves, J., Jan. 6, 1994) at 4.

At the sale only one bidder participated. Atlantic, a wholly-owned subsidiary of Guardian Capital Corporation ("Guardian"), a creditor of the Deiblers with a substantial mortgage on the Dinner Bell Inn property, bid $5,000 for the Deibler's Dinner Bell, Inc. stock and $12,000 for their Coastal stock. No bid was made for the Distant Horizon stock. The Deiblers made no bid of their own, nor did the Prickett firm which had come to an agreement with Guardian concerning the bidding. That agreement was to the effect that the Prickett firm would not bid if Guardian promised either to bid $100,000 or to pay

to the Prickett Firm, if Guardian (i.e., through Atlantic) prevailed in the bidding at a price less than $100,000, the difference between its winning bid and $100,000.

After the sale, the Deiblers continued to resist the process. On November 2, 1993, Atlantic filed a civil action in the Superior Court to obtain a writ of possession to the Dinner Bell Inn, which, as noted above, constituted the sole substantial asset of Dinner Bell, Inc. That action drew into issue the validity of title to the stock of Dinner Bell, Inc. acquired by Atlantic as a result of the sheriff's sale. Following two days of taking evidence, the court rejected each of the positions advanced by the Deiblers and granted the

writ of possession to Atlantic, requiring the Deiblers to give up possession of the Inn itself to Atlantic. This appeal followed.

II.

The Deiblers advance three grounds in support of their position that the granting of the writ of possession was reversible error. First, they assert that the notice of sale was entirely inadequate fairly to apprise any potentially interested buyers of the value of their stock. Even if the notice employed did meet with skeletal statutory requirements of Delaware law, they assert that nevertheless it did not in these circumstances afford to them due process of law which is assured to them by the Fourteenth Amendment to the United States

Constitution. Second they claim that the Superior Court's conclusion that the results achieved in the sheriff's sale were not such as to make necessary another further effort to sell this property at sheriff's sale was incorrect and constituted ad abuse of judicial discretion. Logically related to this contention is the subsidiary claim that the court's determination of the fair market value of the Dinner Bell Inn and of Dinner Bell, Inc. stock was against the weight of the evidence. Third, and also related to the claim that the value achieved was not such as to permit the trial court to confirm the sale, is the claim that the court inappropriately "modified" the record after the close of the evidence to enhance the amount realized from the sale.

As set forth below, we conclude that the notice, while rather far from an ideal towards which we might strive, did meet the formal requirements of Delaware law, and in the circumstances satisfied the requisites of procedural fairness to appellants.

The central ground of the appeal is the claim that, in all events, the small amounts bid were so disproportionate to the fair value of the Dinner Bell, Inc. stock that justice requires a further sale be undertaken, even if the notice is found adequate. We consider this claim below and agree that the amounts realized here are such as to raise a concern that the process misfired, even if one might not identify a legal error embedded in

it. But we conclude that considering all of the circumstances, importantly including the Deibler's own conduct, the Superior Court did not abuse its sound discretion in confirming the sale and issuing the writ of possession. Most pointed in that connection are the Deiblers' efforts to subvert the judicial process by secretly attempting to dissolve the corporations at a time in which all of their capital stock had been attached and was thus in the custody of the court; their effort to denude those corporations of their assets on the eve of a judicial sale; and their failure to attempt promptly and completely to remove the cloud that their conduct caused. These acts are little short of contemptuous. It cannot be that one can seek, as the Deiblers did, to subvert the

operation of the court's legal process and at the same time, seek the discretionary protection that motions to set aside judicial sales afford.

As to the third claim, it is briefly described below. We think it of no materiality. It presents a question of form not substance. While we do understand that matters of form may be of importance in many legal contexts, as we explained below, we cannot conclude that any interest of the Deiblers or of the public interest was affected by the matter of which Appellants complain.

III.

Before stating the basis of our affirmance of the determination below, we note that in this appeal we have no

occasion to address the question whether the Deiblers have waived all rights to complain about any aspect of the sheriff's sale by reason of their apparent failure to file with the Superior Court in a timely way an application to set aside the sheriff's sale. *See* Super.Ct.Civ.R. 69(d) (1991); Victor B. Woolley, 2 *Practice in Civil Actions In Delaware* 768 (1906). With respect to confirmations of sheriff's sales Woolley states:

> Confirmation. When land is sold under a *vend. exp.* or other appropriate execution process and there are no objections made to the sale, the sale is confirmed at the return term of the writ, as a matter of course, without any act or decree of the court; and a sale so

> confirmed is final in its character and effect, and cannot afterwards be inquired into, nor can its validity be controverted collaterally. By the rules of the court, applications to set aside sheriffs' sales must be made on or before the first Thursday of the term to which the writs are returned, and all sales not objected to on or before the first Thursday, are on the first Friday, confirmed as a matter of course. (footnotes omitted)

While Rule 69(d) modifies slightly the times set forth by Mr. Woolley, the essence of his statement remains the law.[1] Most notably that means that

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[1] The current practice, which reflects the abolition of terms of court, requires

objections to the process by which property is sold on execution are waived if the objector fails to file a timely application to set the sale aside, unless the court finds lack of notice or other basis to relieve the party of the consequences of unexcused delay. *Swiggett v. Kollock,* De. Super., 3 Houst. 326, 332 (1866); 47 Am.Jur. 2d., Judicial Sales § 175 (1969).

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that the sheriff's return of sale be made "on the first Monday of the month succeeding the date of the sale and applications to set aside such sales shall be made on or before the first Thursday succeeding such return date, and all such sales not objected to on or before the first Thursday, shall on the first Friday, be confirmed as a matter of course." Super.Ct.Civ. Rule 69 (d).

The record suggests that this principle would have application here. The sale occurred on July 30, 1993. This appeal results not from a motion to set aside the automatic confirmation contemplated by Superior Court Civil Rule 69(d), but from an independent action for a writ of possession filed months later by Atlantic as buyer of the stock at the sheriff's sale. Thus, it appears that Appellants' right to contest the sheriff's sale process has been waived. We do not, however, predicate our decision upon any such waiver, but simply note it in passing because the matter has not been treated below, nor was it raised by any party to this appeal. We do note it, however, lest in addressing the merits of the Deiblers various

contentions on appeal we are misunderstood to approve of any deviation from the settled principle that requires one who seeks to have a sheriff's sale set aside to move promptly, within the times established by Rule 69(d), for that relief.

IV.

We turn then to the assertion that the notice of the sale was so sketchy and incomplete that a forced transfer of the Deibler's property in this instance denied them due process of law. There is no contention that the terms of 10 *Del. C.* § 4972 have not been complied with in this instance. Rather the claim is that minimal fairness in this context required that more information be included in the notice than was included. The Deiblers

say that minimally the notice should have included the fact that the stock to be sold represented all of the outstanding stock of the corporations and should have apprised potentially interested parties where more information might be obtained.

In assessing this claim we begin by acknowledging that a person's right to due process of law continues throughout the execution process and that right impresses certain limitations upon that process. Due process of law, for example, requires that reasonable efforts be made to afford the owner of property that is seized for sale notice of that seizure or attachment by the judicial officer and its prospective sale; it requires that a reasonable process be employed to give notice to the public of the sale so that a reasonable price,

considering the forced sale nature of the transaction, might be obtained; and perhaps due process may require that a court make some after-the-fact review to assure itself that the process employed in fact operated reasonably. Certainly the last element of protection is of such ancient lineage in our law that one could conclude that it forms part of the basic concept of due process of law in this setting. But we need not finely focus upon that question today. The claim today is not that the process envisioned by our statutes is inconsistent with fundamental conceptions of due process of law, but that the notice that the statute contemplates was, in this instance too elliptical to serve its apparent purpose.

The sale of corporate stock at an execution sale is a relatively unusual event calling perhaps for more judicial attention than the sale of real estate or other property with a more easily estimated value. We recognize that the notice employed in this case would not supply a good model for the next execution sale of this type of property. We nevertheless conclude that considering all of the circumstances fundamental fairness does not require that the sale of July 30, 1993 be set aside.

In the ordinary case the content of the notice of sale will not present a separate subject of judicial consideration. The sheriff will, pursuant to his or her processes and standards, fix and distribute a form of

notice. Only if an interested part, *see Burge v. Fidelity Bond & Mortgage Company*, Del Supr., 648 A.2d 414, 418 (1994), either brings the matter before the court prior to the sale or seeks on a Rule 69(d) motion to set the sale aside, will the court be asked to consider the notice. Even then the main inquiry on a Rule 69(d) motion will go to compliance with the terms of the statute and to the overall results the process yielded. It is likely that the content of the notice will, in that setting, be subsumed within these larger inquiries. Only if an interested party brings the matter to court prospectively is the content of a sale notice likely to receive judicial attention. But should the matter of the notice come to the court prior to the

sale, efficiency and fairness in procedure would require the complaining party to raise all arguable defects with the notice or to be held to waive them. Here the Deiblers did present to the court questions concerning the notice prior to the sale, but they did not advance any position concerning the content of the notice.

More generally, in our opinion the process contemplated by Subchapter V of Chapter 49 of Title 10 of the Delaware Code affords due process to judgment debts while being reasonably efficient from the public point of view. Specifically the absence of a requirement for a detailed statement of any chattels or personalty to be sold does not render the process constitutionally defective.

Indeed the Deiblers cite no case supporting an opposite conclusion. In concluding that minimal standards of due process of law do not require the sheriff or the court to describe the property to be sold in more detail than was done here, we are mindful that it is in the economic interest of judgment debtors to encourage wide knowledge of and participation in any execution sale of their property. As the court below expressly advised Appellants, judgment debtors are free to supplement such notice as the sheriff may disseminate. As the owner of the property, they not only have the economic interest rationally to expend the appropriate level of resources on notices, but also

have the fullest (and cheapest) access to relevant information.[2] Thus a rational allocation of costs and burdens of this process, as well as the flexible requirements of due process of law certainly can take into account (and rely upon) the superior access to information and superior incentives (at least where some equity of redemption is arguably present) of judgment debtors. In the special case where there is an equity of redemption present (as here) but the debtor is disabled by poverty from supplementing the minimal legal notice, the court may of course on application

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[2] What did the sheriff know in this case concerning the value of this stock and how is any public official reliably to know such information in the next case involving a closely held business?

exercise its broad supervisory discretion by ordering the supplementation of the notice required by Section 4972 of Title 10. But there is no suggestion in this record that the Deiblers were not in a position to protect their interest in the attached stock as the trial court suggested.

Thus because the Deiblers did not raise any question wit the court concerning the content of the notice of sale when they appeared prior to the sale to question the notice, and because they themselves took no action to address the defects in the notice that they now complain of, even though they were apprised of the right to do so, we cannot conclude that fundamental fairness requires that the completed sale now be

set aside. In fact, of course, the Deiblers not only did not take steps that, so far as the record shows, were in their power to take, but instead engaged in activity designed not to perfect the judicial sale but to subvert it. In these circumstances we could not conclude that the notice employed in the sale resulted in the taking of the Deiblers' property without due process of law.

V.

Appellants claimed below that the amounts realized in the sales were so small in relation to the fair value of the property subject to sale that the Superior Court certainly must set the sale aside and instigate a new sale of these properties. In order to evaluate this argument the trial court took

evidence from experts on the value of the real estate that constitutes the principal asset of both Dinner Bell, Inc. and Coastal. Based on the values, the trial judge concluded that he would not exercise an informed judgment to set aside either sale for gross inadequacy of price. The Deiblers assert on this appeal that the Superior Court's finding of fair value was against the weight of the evidence and thus they ask this Court to set that finding aside. *See Levitt v. Bouvier,* Del. Supr., 287 A.2d 671 (1972). Beyond that, the appellants assert that even if the values determined by the Superior Court are assumed to be correct, the failure of that court to set the sale aside constitutes and abuse of discretion that this Court should correct.

We are thus asked to set aside a finding of fact and to reverse a discretionary judgment. The standards that guide this Court's review of each of these requests is, of course different. So long as the finding of fact is supported by evidence sufficient to permit a reasonable fact-finder to so conclude, it is our role to affirm, even if our own reading of the evidence might incline us towards a different conclusion in the first instance. *Levitt v. Bouvier,* 287 A.2d at 673. With respect to the question whether the Superior Court breached its sound discretion in failing to set aside the sheriff's sale the standard for our review is whether the court has abused its discretion. This standard is deferential. The late

Chief Justice Christie expressed the applicable test as follows:

> Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused. *Chavin v Cope*, Del.Supr. 243 A.2d 695 (1968); *Larrimore v. Homeopathic Hospital Association of Del.*, Del.Supr., 181 A.2d 573 (1962); *Pitts v. White*, Del.Supr., 109 A.2d 786, 788 (1954).

Firestone Tire & Rubber Co. v. Adams, Del.Supr., 541 A.2d 567, 570 (1988).

With respect to the attack upon the trail court's finding of fact, we note that the parties were far apart in their estimations of the fair value of Dinner Bell, Inc. After hearing the testimony and evaluating it, the trial judge concluded that the valuation opinion of Appellant's expert was unreasonably high and that the valuation opinion of Atlantic's expert was more credible. *See Seaford Assocs. v. Board of Assessment,* Del. Supr. 539 A.2d 1045, 1048 (1988). The Court adjusted that opinion in minor degrees in light of articulated factors. Its conclusion was that the assets of Dinner Bell, Inc. had an estimated fair value of $1,836,087 and its estimated liabilities were $859,124. With respect to Coastal the trial court determined its assets to have a fair market value of

$950,000 and to be subject to liens of $425,577. We have reviewed the record and conclude that these conclusions are supported by sufficient evidence and should be affirmed. *Levitt v. Bouvier,* Del. Supr., 287 A.2d at 673 (1972).

With respect to Appellant's claim that even if these are the correct estimations of Dinner Bell, Inc.'s and Coastal's assets and liabilities, nevertheless the Superior Court abused its discretion by failing to set aside the sheriff's sale, we are unable to agree.

Appellants argue that even accepting the trail court's fact finding, the net value of Dinner Bell, Inc. was approximately a million dollars. Yet the

highest bid for all of its stock was only $5,000. How, Appellants ask, can such a result not be set aside on the basis of shocking inadequacy of price? But, the court below did not analyze the financial results of the sale in this way. Rather it considered the value of the Dinner Bell, Inc.'s assets as a base value. It then considered the value achieved for the Deiblers in connection with the execution sale to be in excess of the price paid at the sale itself in two respects. First, as noted above, Atlantic had agreed with the Prickett firm that if Atlantic prevailed in the bidding it would pay to that firm the difference between its bids and $100,000. Thus Atlantic as part of its bid assumed an obligation to pay, on the Deibler's account, $83,000, in addition to its bid.

The trial court counted this as part of the consideration received by the Deiblers. Secondly, following the close of the evidence and upon consideration of the questions before it, the Superior Court ascertained that Atlantic was willing to forego a deficiency judgment against the Deiblers personally on a note the Deiblers secured by a mortgage on the Dinner Bell Inn property. The deficiency was in the amount of $736,087.51. Thus, relying upon *Girard Trust Bank v. Castle Apartments, Inc.*, Del.Supr., 379 A.2d 1144 (1977), the Superior Court reasoned that the Deiblers benefited to the extent of approximately $850,000 from the sale of an asset worth at most $1.8 million. Finally the Superior Court noted that other (non-Guardian) liens existed and

were deserving of consideration. *See Briehler v. Poseidon Venture, Inc.*, R.I.Supr., 502 A.2d 821, 822, *cert. denied*, 476 U.S. 1166 (1986) (encumbrances on property should be considered when assessing adequacy of price).

Thus the Superior Court concluded that, while the Deiblers were benefited somewhat less than 50% of the fair market value of Dinner Bell, Inc.'s assets, *see Burge v. Fideltiy Bond & Mortgage Company*, Del.Supr., 648 A.2d 414, 419 (1994), in the circumstances it was nevertheless sufficient to affirm the sale. A significant role in this determination was played by the fact that the Deiblers were themselves in part

responsible for some confusion that surrounded the sale.

If one may properly count the $736,087 forgiveness by Guardian of the deficiency against the Deiblers personally and the $83,000 credit t the Deiblers judgment debt to the Prickett Firm, as sale proceeds, then, while the amount realized by the judgment debtor from the sheriff's sale falls toward the bottom of the range customarily employed, it nevertheless is sufficient in the circumstances to preclude us from concluding that an abuse of judicial discretion has occurred. We can apprehend no reason why in fairness to the judgment debtors these financial benefits to them should not be counted in this analysis. Surely it is universally

recognized that a valid debt paid or released constitutes a financial benefit to the debtor. *See Girard Trust Bank,* 379 A.2d at 1146-47. That these amounts came to benefit the debtors not by was of direct sale proceeds but by reason of the agreements of the creditors do not, in the circumstances here, disqualify them from consideration. While an agreement that restrains bidding at a judicial sale should be regarded as suspect and may, in a proper case, itself constitute a ground for the exercise of the Superior Court's discretion to set aside a sale under Superior Court rule 69, in this instance it was certainly within the trial court's discretion to conclude that the Prickett/Guardian agreement did not substantially disadvantage Appellants. Thus there is, insofar as we are able to

see, no reason not to take those benefits into account.

The financial benefits to the Deiblers flowing from the waiver of Guardian's right to a deficiency judgment against them similarly is a real benefit entitled to be considered when a court determines whether the entire process was fair to the judgment debtors. The only basis that Appellants assert for not considering this benefit is the claim that the record on the application for the writ of possession did not contain any evidence of such a benefit. Rather it is claimed that after the close of the evidence at the hearing the trial judge inappropriately inquired of Atlantic/Guardian's counsel whether Guardian would be willing to waiver its

right to collect any deficiency from the Deiblers. While this was not an *ex parte* communication, the Appellants contend that the trial court was required to decide the application on the record created at the evidentiary hearing and his considering the response to a post-hearing inquiry was reversible error. While the general principle that a court must decide disputed facts on the record evidence is, of course, elementary, it has no application here. We here deal with a question of form not substantial rights. There is no question that, subject to review for abuse of discretion, a court that is required to exercise a discretionary judgment may condition the grant of a discretionary remedy upon a party agreeing to take voluntary action that the court itself

could not or might not order. This is a fairly common practice in the Court of Chancery where the court is often required to exercise informed discretion, as when it grants any distinctly equitable remedy, such as an injunction. Indeed, it was precisely this technique of conditioning the availability of discretionary relief that the Superior Court employed in the *Girard Trust Bank* case that was relied upon below. *Girard Trust Bank* has been repeated cited approvingly by this court, most recently in *Burge v. Fideltiy Bond & Mortgage,* 648 A.2d at 418. Thus, it is apparent that the court below could have reached the same result simply by conditioning the grant of the writ on the waiver by Guardian of its right to collect a

deficiency, as was done in *Girard Trust Bank*. It is therefore apparent that no substantial right of the Deiblers was affected by the communication of which they complain. The value that the Deiblers received from the waiver was real, economic value. We cannot conclude that the Superior court abused its discretion in taking that value into account in declining to, in effect, set aside the sheriff's sale of July 30, 1993. That decision appears to have been "directed by conscience and reason . . . and . . . has not exceeded the bounds of reason in view of the circumstances [nor] so ignored recognized rules of law or practice so as to produce injustice," *Firestone Tire & Rubber Co. v. Adams*, 541

A.2d at 570. Thus we decline to disturb it.

For the foregoing reasons the judgment of the Superior Court is **AFFIRMED.**

(2)

Supreme Court, U.S.
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No. 94-1872

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

DAVID H. DEIBLER and CARRIE J. DEIBLER,
Petitioners,

V.

ATLANTIC PROPERTIES GROUP, INC. and THE OLD DINNER BELL INN, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the scope of notice of the pending sale made through the customary statutory advertising requirements and the contents of the sale bills utilized by the Sheriff of Sussex County afforded Petitioners due process of law under the Fourteenth Amendment of the United States Constitution with regard to the protection of their property interest in their attached corporate stock being sold at execution sale.

PARTIES

Petitioners, David H. Deibler and Carrie J. Deibler are individuals.

Respondents, Atlantic Properties Group, Inc., and The Old Dinner Bell Inn, Inc. (the actual corporate name as reflected in the Delaware Supreme Court's decision is The Old Dinner Bell Inn, Inc. and not "The Dinner Bell Inn, Inc." as named in the filing by Petitioners), a corporation of the State of Delaware.

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No. 94-1872

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

DAVID H. DEIBLER and CARRIE J. DEIBLER,

Petitioners,

v.

ATLANTIC PROPERTIES GROUP, INC. and
THE OLD DINNER BELL INN, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Atlantic Properties Group, Inc., a Delaware corporation, and The Old Dinner Bell Inn, Inc., a Delaware corporation, respectfully request that

this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, David H. Deibler and Carrie J. Deibler.

OPINIONS BELOW

This case was originally brought in the Superior Court of the State of Delaware in and for Sussex County and was known as C.A. No. 93M-11-001. After trial on December 30, 1993 and January 4, 1994, Judge T. Henley Graves issued an oral decision on January 5, 1994 and a written decision on January 6, 1994 confirming a sheriff's sale of stock held on July 30, 1993 of ten shares of a corporation known as Coastal Resort Properties, Inc. and 500 shares of a corporation known as The Old Dinner Bell Inn, Inc. to Respondent Atlantic Properties Group, Inc.

The Delaware Supreme Court unanimously affirmed the judgment by

written opinion dated January 11, 1995 which opinion is reported as Deibler v. Atlantic Properties, Inc., 652 A.2d 553 (Del.Supr. 1995). Petitioners' application for a rehearing was denied on February 10, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the United States Constitution, Amendment XIV, Section 1.

STATUTES INVOLVED

The statutes in issue are 8 Del.C. §324 and 10 Del.C. §4972.

STATEMENT OF THE CASE

On November 25, 1992, a judgment creditor of Petitioners, Prickett, Jones, Elliott, Kristol & Schnee ("PJEK&S") entered judgment against Petitioners in the sum of $121,250.08. Following

discovery PJEK&S attached 500 shares of corporate stock of The Old Dinner Bell Inn, Inc., 100 shares of stock of Distant Horizon Dream, Inc. and 10 shares of Coastal Resort Properties, Inc. A sheriff's sale of these closely held corporate stock was scheduled for July 30, 1993 to be conducted by the Sussex County Sheriff's Office.

On July 2, 1993, the Sussex County Superior Court, after a full hearing at which Petitioners and their counsel were afforded the opportunity to participate in fashioning both the contents of the proposed sale bill and the scope of notice of the sale, entered an order for the sale. Petitioners were also advised by the Court that they were free independently to supplement the normal scope of notice and contents of the sale bill and declined to do so.

Prior to the sale and despite the fact that their stock in these three corporations had been attached by the Sheriff of Sussex County and was held in Custodia Legis, Petitioners sought to avoid or disrupt the sale by filing certificates of dissolution with the Delaware Secretary of State for all three corporations and to record deeds from The Old Dinner Bell Inn, Inc. and Coastal Resort Properties, Inc. conveying certain real estate assets of these corporations to themselves.

Respondent Atlantic Properties Group, Inc. ("Atlantic") was the successful bidder for the Dinner Bell and Coastal stock and after Petitioners refused to give Atlantic possession of the Dinner Bell Restaurant and Motel, Atlantic commenced this action for a writ of possession.

Petitioners, in addition to resisting the writ of possession, challenged the confirmation of the sheriff's sale both on the basis that the contents of the sale bill and the scope of advertising for the sale of stock failed to meet the minimum standards of due process required to protect their property interests and on the basis that the sale price paid for the stock was grossly inadequate. Petitioners have continued to contend that the sale should not have been confirmed.

Following a trial of all issues on December 30, 1993 and January 4, 1994, the Sussex County Superior Court issued an order granting a writ of possession for the Dinner Bell property and confirming the sheriff's sale.

Petitioners took an appeal to the Delaware Supreme Court and by opinion dated January 11, 1995, rehearing denied

February 10, 1995, the Delaware Supreme Court affirmed the lower Court's confirmation of the sheriff's sale of the stock and holding that the Petitioners were not deprived of their due process of law. The Delaware Supreme Court made special note of the fact that Petitioners own conduct in engaging in activity designed to subvert the judicial sale process was a contributing factor to this result.

In this petition, Petitioners, appearing pro se, largely seek to reargue the factual findings reached by prior courts and essentially by their petition seek a rehearing as to the resolution of issues of fact decided in the Court Below against them.

To the extent that Petitioners' contentions reach the level of a legal contention it is that the scope of notice

for the sale and the contents of the sale bill, which they admitted at trial conformed to extant Delaware statutes, have deprived them of their protected property interest in their stock by limiting advertising for bidders and by limiting available information which if known would have resulted in a higher bid price for the stock and that such limitations have deprived them of due process of law. Petitioners make this argument despite the fact that at a judicially supervised hearing they and their counsel were afforded the opportunity for input into the scope of notice and the contents of the sale bill and were permitted to supplement the same although they declined to further participate.

The Delaware Supreme Court on undisputed facts found that Petitioners

themselves engaged in activity which subverted the judicial sale and thus adversely impacted their own rights prior to the day of sale. A review of the facts of this case and relevant authorities reveals that the Trial Court and the Delaware Supreme Court both properly applied the facts to the law and determined that Petitioners' property rights were adequately protected and thus, in the instant case, certiorari should be denied.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. The property rights of Petitioners were at all times carefully supervised and protected by the Trial Court and the scope of notice and contents of the sale bill to which

Petitioners now object are conceded to have conformed to Delaware law and were found by the Trial Court and the Delaware Supreme Court to afford due process of law to Petitioners. On the due process issue, Petitioners were afforded the opportunity both as to the scope of notice and as to the contents of the sale bill to go beyond the minimum requirements of the Delaware statute and at a presale hearing declined to do so.

II. What Petitioners really seek to have this Court do is to retry the operative facts relating to value that were necessarily found against Petitioners as a part of the sale confirmation process and such retrying of factual issues does not present an appropriate reason for this Court to grant certiorari.

III. Even if Petitioners had a legitimate constitutional issue relating

to violation of their property rights and a failure to receive due process of law, Petitioners would be precluded in this case from successfully making such a contention since Petitioners engaged in activity immediately prior to the sale specifically designed to subvert the judicial sale and to frustrate the judgment creditor bringing the sale and bidders such as Respondent Atlantic from receiving the benefits of their successful competitive bid at the sale.

REASONS FOR DENYING THE WRIT

I.
THE SCOPE OF NOTICE OF THE SALE AND CONTENTS OF THE SALE BILL AS REQUIRED BY 8 Del.C. §324 AND 10 Del.C. §4972 AFFORDED DUE PROCESS OF LAW TO PETITIONERS.

Petitioners have failed to satisfy criteria traditionally applied by this Court in determining whether to grant a

writ of certiorari. In an effort to obtain review here, Petitioners have filed a petition characterized by their opinions and their arguments cast in a manner that, reduced to its essence, is more suitable for a rehearing to resolve issues of fact and, in particular, the testimony of appraisers as to property value. In their characterization of the question presented for review, Petitioners contend that they were deprived of due process of law by exposure of their attached and seized stock under circumstances where the scope of notice and the contents of the sale bill were so lacking in detail so as to deprive Petitioners of due process of law and consequent loss of property.

The Delaware Supreme Court applied and confirmed long standing Delaware case law in determining that the price bid for the stock was adequate and that there were

no defects or irregularities in the process of conducting the sale or any other sufficient matter whereby the rights of parties to or interested in the sale could have been prejudiced. Burge v. Fidelity Bond and Mortg. Co., 648 A.2d 414 (Del.Supr. 1994).

With regard to Petitioners' contention that they had been deprived of their protected property interests and of fundamental fairness and due process of law, the Delaware Supreme Court held that the advertising process followed by the Superior Court (the Trial Court) and the Sheriff of Sussex County were in compliance with the long established statutory procedures for the sale of attached stock enunciated in 8 Del.C. §324 and 10 Del.C. §4972. Clearly, these statutes comport with the minimum standards of procedural and substantive

due process and furnish no basis for this Court to exercise its discretionary review powers.

The due process clause of the Fourteenth Amendment is not intended to control procedure in state courts or to regulate practices. Holmes v. Conway, 241 U.S. 624 (1916). A state such as Delaware is free to regulate the procedures relating to its execution process which are a function of its courts based on its own conception of policy and fairness unless by doing so it offends some principle of justice. Snyder v. Massachusetts, 291 U.S. 97 (1934). No principles of justice are offended by the state procedures utilized in this case.

Succinctly stated, the rights of Petitioners were carefully supervised by the Trial Court and carefully reviewed by the Delaware Supreme Court and a review of

the facts and the applicable statutes clearly establishes, both as to the scope of notice and to the contents of the sale bill, that the requirements of Delaware law were met.

II.
PETITIONERS DID NOT RAISE ANY ISSUE WITH THE TRIAL COURT CONCERNING THE CONTENTS OF THE SALE BILL OR THE SCOPE OF NOTICE DESPITE A SPECIAL HEARING TO DO SO AND ARE THUS PRECLUDED FROM SUCCESSFULLY CONTENDING THEY HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW BY VIRTUE OF SUCH WAIVER.

The Trial Court and the Delaware Supreme Court both found that while the Trial Court was willing to exercise its broad supervisory discretion to permit the supplementation of notice required by 8 Del.C. §324 (which references 10 Del.C. §4972), Petitioners did not pursue that opportunity with the Court at or

immediately after the time of the hearing where they could have done so and have thus waived such rights. What the Delaware Supreme Court was asked to do in the Court Below and what this Court is being asked to do is to simply set aside findings of fact and in essence determine whether the Court Below breached its sound discretion in failing to set aside the sheriff's sale of stock. It is respectfully submitted that it is not the purpose of review on certiorari by this Court in a non-constitutional setting to simply substitute its judgment for that of the Court Below. Such judicial discretion by the Delaware Supreme Court involved the application of Delaware state statutes and Delaware case law. No constitutional rights of either these Petitioners or of persons similarly situated in the future are at issue. This Court should decline

to exercise its jurisdiction to hear this matter.

III.
PETITIONERS ARE PRECLUDED FROM SUCCESSFULLY CONTENDING THAT THE SCOPE OF NOTICE OF THE SALE AND CONTENTS OF THE SALE BILL RESULTED IN A DENIAL OF DUE PROCESS OF LAW SINCE THEY ENGAGED IN ACTIVITY DESIGNED TO SUBVERT THE JUDICIAL SALE.

Even assuming that Petitioners could convince this Court that the Delaware statutes relating to scope of notice and contents of sale bills do not meet the minimum standards of due process and that Petitioners either did not waive or were wrongfully affirmatively denied at the hearing in which they participated the right to expand on the minimum statutory requirements, Petitioners are precluded from having the sheriff's sale set aside in the instant case because they

personally engaged in activity designed to subvert the judicial sale. The Court Below reached such a conclusion. Deibler v. Atlantic Properties, Inc., 652 A.2d 553 (Del.Supr. 1995 at p. 558). That determination is a matter of state law and procedure and is not a constitutional issue. The principle of not profiting by one's own wrong doing is deeply embedded in Delaware law. Colton v. Wade, 80 A.2d 923 (Del.Chan. 1951). Petitioners ask this Court to overlook their own conduct. This Court should not permit Petitioners to profit by their own wrongdoing.

The Delaware Supreme Court carefully followed the standards and guidelines of Delaware statutory law, its own standards established in the Delaware cases and correctly held that Petitioners, even ignoring their own activity designed to subvert the judicial sale process, were

not deprived of due process by having their stock sold at a sheriff's sale where the scope of notice and the contents of the sale bill both met minimum due process standards and could have been expanded on by Petitioners with Court approval.

CONCLUSION

Accordingly, for all of the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
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CASE NO. 94 - 1872

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DAVID H. DEIBLER and CARRIE J. DEIBLER,

PETITIONERS

vs.

ATLANTIC PROPERTIES GROUP, INC., and
THE DINNER BELL INN, INC.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

ATLANTIC PROPERTIES GROUP, INC., a corporation of the State of Delaware and THE OLDE DINNER BELL INN, INC., a corporation of the State of Delaware,	*	C.A.No.93M-11-001
Plaintiffs,	*	
v.	*	
DAVID H. DEIBLER and CARRIE J. DEIBLER,	*	
Defendants.	*	

DECISION AFTER HEARING

Dates of Hearing: December 30, 1993 and January 4, 1994

Date of Oral Decision: January 5, 1994

Date of Written Decision: January 6, 1994

George F. Gardner, III, Esquire, Parkowski, Noble & Guerke, P.A., P.O. Box

598, Dover, Delaware 19903, attorney for plaintiffs.

Henry A. Heiman, Esquire, Heiman, Aber & Goldlust, P.O. Box 1675, Wilmington, Del. 19899, attorney for defendants.

GRAVES, Judge

Posture

On November 2, 1993, Atlantic Properties Group, Inc. ("Atlantic") and The Olde Dinner Bell Inn, Inc. ("Dinner Bell") filed a complaint and petition for rule to show cause against David H. Deibler and Carrie J. Deibler ("Deiblers"). The rule to show cause seeks a writ of possession arising from Atlantic's purchase of Deiblers' stock in Dinner Bell. More specifically, the writ

of possession concerns real property Dinner Bell owned. At issue is a sheriff's sale on July 30, 1993 of the Dinner Bell stock and stock in Coastal Resorts Properties, Inc., stock which the Deiblers also owned. On November 3, 1993, the Rule to Show Cause was granted and December 2, 1993 was the date set for the hearing on the application. The matter subsequently was continued to December 30, 1993. Following a full day of testimony, the case was continued to January 4, 1994. Because another sale involving the litigants is scheduled for January 6, 1994 and because that sale is dependent on this Court's ruling, the parties seek an expedited ruling. The Court orally ruled on January 5, 1994 that it confirmed the sale on July 30,

1993. This is the Court's written ruling as to the issues presented.

A Brief History

Mr. and Mrs. Deibler own or have owned several properties in the Rehoboth Beach and Dewey Beach area for many years. The changes in economic conditions over the past several years have been unkind to the Deiblers, resulting in their loss of properties by way of mortgage foreclosure or sheriff's sales by judgment holders.

The Deiblers have fought hard to retain their properties but sometimes, they have crossed the line of legally acceptable conduct.

The Deiblers sought bankruptcy protection but eventually were dismissed from bankruptcy court and ordered not to

file a bankruptcy petition for a period of six months.

On November 25, 1992, Prickett, Jones, Elliott, Kristol & Schnee ("Prickett, Jones") entered judgments against the Deiblers in the principal sum of $121,250.08. Prickett, Jones previously had represented the Deiblers, and the judgment was for services rendered. The Deiblers attacked the judgment, but this Court upheld it.

The Deiblers would not comply with post-judgment discovery requests until the morning of a contempt hearing. The Deiblers then revealed their shareholder interests in Dinner Bell, Coastal Properties, Inc. ("Coastal") and Distant Horizons Dream, Inc. ("Distant Horizon"). On July 2, 1993, this Court entered an order for the sale of the Deiblers' stock

in Distant Horizon (100 shares), Dinner Bell (500 shares), and Coastal (10 shares).

On July 2nd, the Court also entertained argument from the Deiblers for advertising beyond what is required by statute. The Deiblers sought an order requiring four weeks of advertising in The Washington Post, the Coast Press, The Whale, and The News Journal. The Court, on July 2, 1993, set July 30, 1993 as the sale date in order to allow for more time for advertising than the 10 days which 10 *Del.C.* §4972 requires. The Court specifically advised the Deiblers if they wanted any further advertising beyond the statutory requirements, then they were free to do so. The Sheriff posted the following sale bill:

SHERIFF'S

SALE

By virtue of a Fi Fa to Levy and Sell, to sell all goods and chattels, to me directed, will be exposed for Public Sale on:

FRIDAY, JULY 30, 1993

AT 1:00 O'CLOCK P.M. (D.S.T.)

In front of the Courthouse, Georgetown, Georgetown Hundred, Sussex County, State of Delaware, the following described goods and chattels, to wit:

100 Shares of Stock - Distant Horizon Dream, Inc.

500 Shares of Stock - The Olde Dinner Bell Inn, Inc.

10 Shares of Stock - Coastal Resort Properties,

OR AS MUCH IS REQUIRED TO SATISFY WRIT

TERMS: Cash or Certified Check on day of sale.

Seized and taken in execution as the property of David H. Deibler and Carrie J. Deibler, and will be sold by

WILLIAM L. JONES, SHERIFF

Sheriff's Office, Georgetown, DE

While the Deiblers desired an increase in advertising as to time and newspaper coverage, they made no complaint as to the "quality" of the contents of the sale notice until after the sale. No evidence was presented that the Deiblers themselves advertised the property for sale.

Between July 27, 1993 and July 29, 1993, the Deiblers filed Certificates of Dissolution with the Secretary of State

for Distant Horizon and Dinner Bell and then executed and recorded deeds purporting to transfer to themselves real property held by Dinner Bell and Coastal.[1] The Deiblers gave no consideration to the corporations. Their actions were a final attempt to thwart the legal process which exposed their interest in the corporations to sheriff's sale.

Prickett, Jones sought immediate relief. By way of teleconferences, the Court communicated its shock as to the Deiblers' conduct. The Court was left with the impression that the aforementioned actions would be reversed

---

[1] Apparently, in their haste, the Deiblers dissolved Distance Horizon instead of Coastal. Distant Horizon had no assets.

and the sale would go forward. James Tyler, Esquire and Michael McGroerty, Esquire were the attorneys with whom the Court communicated, as they were either representing the Deiblers or had participated in the legal paperwork concerning the aforementioned dissolutions and deeds.[2]

On July 30, 1993, the sale proceeded, but the Deiblers made the decision not to reverse the dissolutions and not to convey the real property back to the respective corporations. This was announced at the sale.

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[2] The evidence established that neither attorney advised Mr. Deibler as to the aforementioned conduct and that Mr. McGroerty was not aware of the pending sheriff's sale when he prepared the documents.

It should be noted that Atlantic was formed as a wholly-owned subsidiary of Guardian Capital Corporation ("Guardian"), a judgment creditor of the Deiblers and Dinner Bell. Atlantic apparently was created as a separate entity to bid upon the Deiblers' stock. Guardian was interested in bidding on the aforementioned stock, but was leery of unknown or contingent liabilities. Therefore, Atlantic was created. Guardian also had attached the Deiblers' stock, but this came after the Prickett, Jones attachment so that Guardian's attachment was junior to that of Prickett, Jones.

Atlantic/Guardian and Prickett, Jones agreed that in the event Prickett, Jones was successful in obtaining the stock of the Dinner Bell or causing the

stock to be sold at auction and providing Atlantic the opportunity to purchase the stock, then Atlantic would pay up to $100,000 for the stock. Atlantic was not interested in paying over $100,000 for the stock but would guarantee Prickett, Jones $100,000 minus any credits from any bidder if Prickett, Jones was successful in exposing the stock property to public sale. Time was important as the six months in which the Deiblers were effectively barred from filing bankruptcy was nearly at end.

At the sale, Atlantic successfully bid $12,000 for the Deiblers' Coastal stock and $5,000 for the Deiblers' Dinner Bell stock. No bid was made for the Distant Horizon stock. A total of $17,000 was bid and to be applied against

the Prickett, Jones' judgment of $172,000 against the Deiblers.

Immediately after the sale, Atlantic and the Deiblers reached an agreement which would have resolved all the issues concerning the stock sale. As part of the same, the Deiblers paid $22,000 into an escrow account as a condition of good faith performance. The Deiblers then stopped payment on the check.

After the sale, Guardian consummated its agreement with Prickett, Jones whereby Guardian would pay over to Prickett, Jones $83,000, the difference between $17,000.00, which Atlantic paid at the sale for the stock, and the $100,000.00 Guardian offered for the stock by way of either bidding or purchasing from Prickett, Jones.

On December 30, 1993 and January 4, 1994, the parties were given the opportunity to present evidence to support their respective positions as to the validity of the sheriff's sale which took place on July 30, 1993 and confirmation of same as well as to present oral argument. The Court requested and received memoranda from the parties on December 28, 1993.

Appraisal Testimony - Dinner Bell

The parties are worlds apart as to their respective positions on the value of the real property owned by the corporations and the value of the corporate stock.

The Deiblers presented John J. Mattey, an expert in valuing real estate and businesses.

Mr. Mattey testified that an appraisal can be conducted using any of the following methods or a combination thereof:

1. Costs
2. Income
3. Market Data (sales comparison)

He used the market data and costs approach. He determined that the income approach was not reasonable in spite of having appraised the property two years earlier on an income approach.

In the costs of approach to valuation, an appraiser first must place a value on the unimproved land and then determine replacement costs minus depreciation. To determine the value of the unimproved land, market comparables necessarily are used. Mr. Mattey found the value of unimproved R-1 and C-3

property Dinner Bell owned to be $2,323,000. After considering the cost and depreciating factors for the improvements, as well as personalty, good will and the liquor license, he valued the Dinner Bell property at $3,178,000.

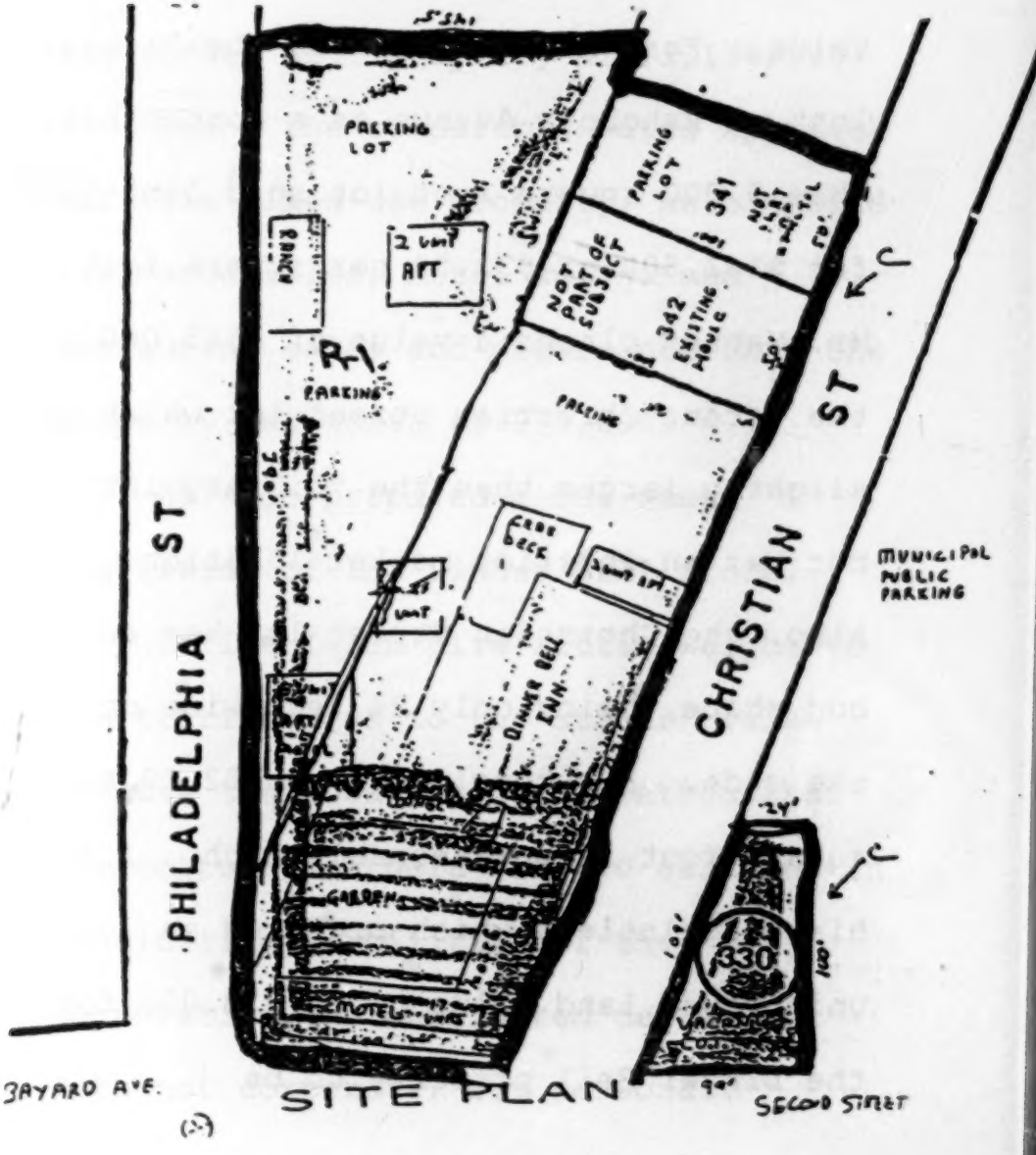
Using the comparable sales approach for this mixed-use property, he compared residence sales, motel sales, and restaurant sales and determined that the property was worth $2,970,000.

He also prepared a one sheet evaluation of the Dinner Bell stock.

I find I can give little weight to his testimony as to the stocks' value because there was no confirmation that the corporation held $50,000 cash and in considering liabilities of the corporation, he considered debts that were not corporate, but personal.

Overall, I cannot accept Mr. Mattey's opinion as to the fair market value of this property. It is my finding that his analysis produces a value that is substantially higher than fair market value. For example, he uses the "library lot" on Rehoboth Avenue as a comparable. This 5,000 square foot lot sold last year for $162,500 or $32.50 per square foot. Mr. Mattey places a value of $345,000 on the vacant Christian Street lot which is slightly larger than the "library lot" but has an inferior market location. Also, the Christian Street lot has an odd shape, being only 24 feet wide on one side. His conclusion of $52.00 a square foot is unreasonably high. I find his calculations which produced an unimproved land value of $2,323,000 for the Dinner Bell property to be

unrealistic for a parcel this size (see below) with its partial R-1 conditional use zoning and its location on the third block from the beach.



SITE PLAN

I find his comparable adjustments also place too much emphasis on the potential of the property. The Court must consider that any potential bidder is going to look at the property from the point of view of income: What is going to be the return on investment and will the cash flow produce an economically favorable result? Even Mr. Mattey acknowledges the income track record of the property is inconsistent with his appraisal.

Finally, I note that Mr. Mattey testified he did not use the income approach because of the poor physical condition which would require an expenditure of capital to renovate the property, but he was unable to quantify this further investment. His market value valuation of $2,970,000 means a

willing buyer would pay this amount for the property and then again have to make unknown expenditures for renovations. In summary, I find this valuation to be unreasonably high.

McGinnis on the Dinner Bell

Atlantic's expert was Philip McGinnis. Mr. McGinnis considered all three valuation methods: market comparison, cost, and income.

As to cost, he also had to reach a value as to the land itself. Using comparables, he established a fair market value of $10.00 a square foot for the land for a total of $637,000. The cost of improvements thereon minus depreciation is $859,000. The total cost valuation is $1,496,000. If find the use of $10.00 per square foot to be low in view of the library property being $32.00

per square foot. It is low even considering he uses the $10.00 per square foot for the entire property, including the R-1 property. I recognize larger parcels bring less per square foot than smaller parcels, but his figures produce a substantial shrinkage.

Using the market sales approach, Mr. McGinnis found the property to be worth $1,486,000. it is my finding that the restaurants used as comparables are sufficiently dissimilar to the Dinner Bell so as to lower the valuation of the restaurant.

Mr. McGinnis is of the opinion that the income approach is the most reasonable because of problems with adjusting comparables and because any prospective buyer will consider it for

only one purpose - its ability to generate income.

He analyzed the motel income, apartment income, residence income and restaurant income separately and reached a combined income valuation price of $1,686,000. I find his analysis of the rental properties to be reasonable. Mr. Mattey is of the position that if Mr. McGinnis' income approach is used, the square footage of the restaurant should be increased to consider the potential uses of other parts of the building.

It is my conclusion that the fair market value is best evidenced by the income approach, an approach that the Deiblers' expert chose not to present. Further, I find the square footage Mr. McGinnis used to be reasonable since it is typical of how the restaurant is being

operated. I adjust his valuation upward because the vacant Christian Street lot produces no income. In view of the municipal parking lot being across the street and the parking available on the R-1 portion of the property, I believe it unreasonable not to consider the separate value of this property for something other than a parking lot. I place a value of $150,000 on this lot considering that its location is inferior as compared to the library lot and its odd shape offsets its superior size. In summary, I find the fair market value of the Dinner Bell to be $1,686,000 plus $150,000 for a total of $1,836,000. Any purchaser takes subject to the Wilmington Trust Company lien, which I find to be $123,037, and the Guardian lien, which is $736,087, for a total of $859,124 in liens.

The Coastal Resorts' Appraisal

Coastal Resorts owns property at 5 Maryland Avenue and 7 Maryland Avenue in Rehoboth. Both Mr. McGinnis and Robert Kaufmann, the Deiblers' expert appraiser, testified as to the value of these properties.

As to 5 Maryland Avenue, I find that Mr. Kaufmann's appraisal is more reflective of this beach block property. He testified that this property is in need of renovation or should be demolished and a new residence built. In view of this, I accept his valuation of $250,000.

The 7 Maryland Avenue property consists of four condominiums and a separate building at the rear of the property. The condominiums have recently been renovated and each have three

bedrooms and one and one-half baths. These units are also in the beach block. Two of Mr. Kaufmann's comparables were townhouses, which I believe inflates his estimate above the fair market value. Two of Mr. McGinnis' estimates were high rise condominiums which, while closer to the boardwalk, also have the inconvenience of being on the fifth floor. Considering the testimony of each appraiser, I find the fair market value of each of the four units to be $155,000, including furnishings.

The garage apartment has been another legal problem for the Deiblers. They believe the first floor of the garage unit can be converted to additional living space. The City of Rehoboth disagrees and takes the position that it is a garage/apartment, meaning

there must be a garage on the first floor and living space is restricting to the living space above the garage. Even if the City prevails, the second floor apartment has approximately 400 square feet of space. The photographs show a property that has a high rental potential, especially in view of its close location to the beach. I find Mr. McGinnis' $38,000 appraisal of fair market value to be very low. I find Mr. Kaufmann's appraisal of the second floor living area to be more reasonable, and I set a fair market value of $80,000. I have not considered the first floor to have living space as that is an unknown and there will be legal expense in any battle with the City of Rehoboth.

In summary, the fair market value of the real property of Coastal Resort is

$250,000 for 5 Maryland Avenue; $620,000 for the condominiums at 7 Maryland Avenue and $80,000 for the garage unit for a total of $950,000. The liens to Resolution Trust Corporation on these properties total $425,777.

Legal Issues

I. Inadequacy of Sale Price of Personal Property - The Stock.

It is undisputed that the stocks are that of closely held corporations. They have no easily determinable fair market value. They constitute personal property, but are intangible and not readily subject to inspection. Even between a willing buyer and a willing seller, the sale of stock of a closely held corporation requires studious inquiry by the buyer into the assets, liabilities and income potential. Also,

there is always concern on a buyer's part of unknown or contingent liability. Because of this, most sales involving closely held corporations are structured so that it is the assets of the corporation that are sold, not the stock, thereby giving the buyer an added degree of protection.

In the present case we have the worst case scenario for the sale of closely held stock - a forced sale.

Neither the parties nor the Court have been able to locate any law on the adequacy or inadequacy of the sale price of stock or more particularly, stock in a closely held corporation, when exposed to a forced sale. The fact that this is a forced sale is a critical factor the Court must consider. The Deiblers ask the Court to liken the sale of the

closely held stock to a sale of the assets of a corporation, citing *Capozzi v. Antonoplos*, Pa. Supr., 201 A.2d 420 (1964). Since the assets of the corporation are predominantly real property, both parties argue that the Court should apply the 50% of fair market value test which is generally applicable in Delaware in determining the adequacy of the price in a sheriff's sale of real property. *Girard Trust Bank v. Castle Apartments, Inc.*, Del. Super., 379 A.2d 1144 (1977); *Home Beneficial Life Insurance Co. v. Blue Rock Shopping Center*, Del. Super., 379 A.2d 1147 (1977).

Atlantic, in arguing the application of the case law concerning forced sales of real property to the present case, notes that the traditional 50% minimum of

fair market value is not inflexible. In both *Girard Trust Bank v. Castle Apartments, Inc., supra* and *Home Beneficial Life Insurance Company v. Blue Rock Shopping Center, Inc., supra,* Judge Taylor noted that the pool of potential bidders diminishes when the price increases or when the uniqueness of the property limits its use. The bottom line is that the Court should consider the particular nature of the property being sold and the potential market for same in exercising its discretion in determining the adequacy of a bid at a forced sale. I now review the facts involved in this case.

1) A waiver by a judgment creditor's deficiency judgment rights should be considered. *Girard Trust Bank v. Castle Apartments, Inc., supra.* In

this case, Prickett, Jones has accepted $17,000 by way of the sale process and $83,000 from its agreement with Guardian. The Deiblers have been credited $100,000 toward the personal judgment against them in the amount of $172,000.

2) Any purchaser of the stock in either corporation would have to consider not only the assets of the corporation would have to consider not only the assets of the corporation but the liabilities. Each corporation has substantial mortgage liens and judgment liens. The existing mortgage and judgment liens on the Dinner Bell property total approximately $859,124. On Coastal, the liens are approximately $425,777. The Court should consider these liens. *Briehler v. Poseidon Venture, Inc.*, R.I. Supr., 502 A.2d 821

(1986). Of the $859,124 on the Dinner Bell, $736,087 is the Guardian lien. That lien is also a personal lien against the Deiblers. If the sale is affirmed, Guardian has represented to the Court it will only pursue collection of the $736,087 from the Dinner Bell assets, thereby effectively releasing the Deiblers from the personal judgment.

3) It is apparent that neither corporation has sufficient cash flow to service their respective indebtedness. The survival of the corporations would require a prospective bidder to consider not only the indebtedness but also to consider a substantial infusion of additional capital to keep the companies afloat.

4) The zoning of the Dinner Bell properties is a factor in

determining the uniqueness of the property because the residential property provides parking for not only the rental properties located on the R-1 land but also parking for the commercial property. This is accomplished by way of a non-conforming use. This results in a higher value for both the commercial property and R-1 properties as they are used in conjunction with each other. The drawback is that if divided, the property would be worth less than the whole.

5) I find that the Deiblers have not established that there would be a higher bid if a second sale should be scheduled. *Girard Trust Bank v. Castle Apartments, supra.* The only evidence presented was by way of cross-examination of Mr. Hirsch, the representative of Guardian. He acknowledged that on

September 1, 1993, a month after the sale, an individual called him and offered to buy the Dinner Bell for $400,000, subject to the first mortgage, if Guardian would accept $400,000 as payment in full on its $736,087 deficiency judgment. This was not acceptable to Guardian. I do not find Guardian's business decision t be unreasonable nor do I find that this testimony establishes that this third party would bid at any future sale.

6) There are no warranties provided a potential bidder, especially as to contingent or unknown liabilities. Bidding with the potential of purchasing unknown or contingent liabilities is a unique factor the Court must consider.

In considering the adequacy of the bids for the respective corporations, the

Deiblers argue that the Court should focus on equity (assets minus liabilities) whereas Guardian argues the Court should focus on the entire financial picture, that being that the successful bidder takes subject to the liabilities and when the liabilities and the bid are taken together, the price is adequate.

The valuation methodology in Chancery Court usually considers an equity approach; that is, following a sale, what will be the shareholders' interest. In Chancery Court, the review is to determine if shareholders have been treated fairly in the context of a business decision. In the present case, the Court must examine the consequences of a forced sale created by the shareholders' individual financial

situation. My analysis is more a substantive due process test as opposed to the test of what is best for the corporations and shareholders.

If the sale is confirmed, the Deiblers have received a $100,000 credit against the Prickett, Jones debt, a release of the $736,087 owed by them personally as well as Atlantic/Guardian taking the property subject to the remaining liens, which are substantial. The Wilmington Trust obligation is $123,037. The Resolution Trust Corporation obligation is $425,777.

Even in the application of the sale of real property, the 50% rule recognizes that up to 50% and perhaps more of the equity or value of the property may be lost in a forced sale. it is unfortunate that individuals suffer financial

setbacks, but it is a fact that the Court cannot change. I conclude that the Court should examine the entire financial picture, including the liabilities, and not merely the potential equity involved.

I find the $5,000 bid for the Dinner Bell stock, when considered with the $859,124 debt, to be adequate. I find the bid of $12,000 for the Coastal stock, which is subject to the $425,777, to be adequate.

While my analysis confirms a result which is less than the 50% rule, I have noted the special circumstances which exist in these sales.

II. Sufficiency of Contents of the Sale Bill

The sale bill stated that the following goods and chattels would be sold: 100 shares of stock in Distant

Horizon, 500 shares of stock in Dinner Bell and 10 shares of stock in Coastal. The Deiblers complain that although this is technically all that is required, there has been a violation of substantive due process. The Deiblers argue that a prospective bidder has no means of determining whether what is being sold is 100% of the outstanding stock of the corporation or a minority interest. The Deiblers also argue that because the asset is intangible, there is no opportunity to "kick the tires" and visually inspect, as may be available at the sale of most personalty.

The sale of stock, especially closely held stock, is unique, but it is to be conducted in the same manner as other personalty. 8 *Del.C.* §324 (a) and (d).

A prospective purchaser of this property might have had more difficulty in obtaining information than in the situation of the sale of real property, but the means were available to obtain a reasonable amount of information. Any prospective bidder could have researched the Recorder of Deeds' records for any land owned by the corporations, any liens thereon, and to determine if any U.C.C. Article 9 filings exist. Additionally, this Court's files reveal a wealth of information concerning the corporations and the litigants. The files also provide names, addresses and phone numbers of attorneys who represent the Deiblers and who could be sources of information. Finally, the sale bill and the files provide the names of the

Deiblers, who would be a source of information.

In short, a reasonable bidder may have to do more work due to the uniqueness of the property being sold, but that should not translate to the Court becoming involved in requiring additional information in the Bill of Sale. It would also invite the subjective problem of determining what is "enough" in each case. Neither the Court nor the sheriff should become involved in descriptions involving the "quality" of the property sold. I note that the real problem that exists in the sale of closely held corporate stock is that no matter how much research one does, the bidder never will be assured that there are not unknown or contingent liabilities also being purchased.

The Deiblers presented no evidence that the description of the property deterred or confused any prospective bidders.[3] Also, I cannot overlook the fact that the Court gave the Deiblers additional time to advertising the sale in a manner they thought appropriate. They chose not to do so.

In light of the foregoing and the Court's earlier analysis and conclusions concerning the adequacy of the price, I conclude that the contents of the sale notice were sufficient.

III. The Agreement Between Prickett, Jones and Guardian

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[3] *Greater Pittsburgh Business Development Corporation v. Braunstein,* Pa. Super., 568 A.2d 1261, 1264 (1990).

There is no evidence that the agreement between two of the lienholders, Prickett, Jones and Guardian, is somehow suspect. It is an agreement between two interested parties attempting to secure a means of collecting on their judgments. There is no evidence that their agreement was intended to or did chill the bidding process. Such agreements are valid unless it is found the parties intended to depress the price of the property being sold or to suppress competitive bidding. *Jones v. Clary*, Va. Supr. Ct. App., 75 S.E.2d 504 (1953).

Finally, I note that the agreement actually benefited the Deiblers in that it provided a guarantee of $100,000 credit for the Deiblers as to Prickett, Jones while still permitting Prickett,

Jones or any other party to bid in excess of $100,000.

IV. The Deiblers' Conduct

Regardless of the particular problems present in this case due to the nature of the property being sold (closely held stock), it was the conduct of the Deiblers that created any potential chill on the bidding process. They chose to dissolve the corporations knowing that the stock had been *in custodia legis* since the levy by the Sheriff. The Deiblers chose to execute the deeds, removing the assets from the corporation. Their goal was to wreck the sale in order to buy time. They cannot benefit from their own misconduct.

It is provided in §8 of Annotation, *Estoppel of or Waiver by Parties or Participants Regarding Irregularities or*

Defects in Execution or Judicial Sale, 2 A.L.R. 2d 6, 42 (1948):

§8. Imprudent or obstructive conduct at sale.

> One proposition which seems to have taken definite form as a principle is that if a judgment debtor shall so conduct himself with respect to an execution sale of his property creating conditions unfavorable for a public sale, without any notice or factual basis reasonably calculated to register legitimate rights, he shall be precluded from later objecting to the sale for that reason, absent equitable grounds for independent relief.

. . .

> Judgment debtors who by their own conduct and assertions at an execution sale of land are shown thereby to cause an alleged inadequacy of the price for which it is sold, are not in a position to later assert the invalidity of the sale upon that ground, especially where it appears that the land is encumbered for more than its actual value. *Teague v. Burk*, (1929, Tex. Civ. App.) 18 S.W.2d 690.

While I may understand why the Deiblers acted as they did, the Court will not undo their own mischief, and they must live by the consequences of

their own acts, especially in light of the clear warnings which the Court gave and which they chose to ignore. The Court had considered contempt proceedings, but in light of the Court's decision upholding the sale, the Court will not pursue any contempt sanctions.

For all the reasons stated herein, the Court confirms the sale on July 30, 1993 of 10 shares of Coastal and 500 shares of Dinner Bell to Atlantic, and an order granting a writ of possession will follow.

IT IS SO ORDERED.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

ATLANTIC PROPERTIES GROUP, INC., a corporation of the State of Delaware and THE OLDE DINNER BELL INN, INC., a corporation of the State of Delaware,	*	C.A.No.93M-11-001
Plaintiffs,	*	
v.	*	
DAVID H. DEIBLER and CARRIE J. DEIBLER,	*	
Defendants.	*	

ORDER GRANTING WRIT OF POSSESSION

AND NOW TO-WIT, this 7th day of January, A.D., 1994, the Court having considered and granted the application of Plaintiffs The Olde Dinner Bell Inn, Inc. and Atlantic Properties Group, Inc. a Rule to Show Cause for a Writ of

Possession to be issued against the Defendants, David H. Deibler and Carrie J. Deibler for those lands and premises more particularly described in Exhibit "A" and depicted on Exhibit "B" in the Petition, being the same lands and premises described in a deed from David H. Deibler, Trustee under Chancery Court Order by deed dated March 27, 1981, and recorded in Deed Book 1063, Page 161 granted and conveyed to The Olde Dinner Bell Inn, Inc., a Delaware corporation, and the Court having held the required hearing on said Rule, Defendants having received appropriate notice of said hearing, and it further appearing that Plaintiffs, The Olde Dinner Bell Inn, Inc. and Atlantic Properties Group, Inc., as their interests appear, are entitled to the said Writ of Possession, pursuant

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to 10 *Del. C.* Subchapter 7, §5011, *et seq.*,

IT IS HEREBY ORDERED:

1. Said Rule for Writ of Possession is made absolute.

2. Said Writ of Possession is hereby granted in favor of Plaintiffs, The Olde Dinner Bell Inn, Inc., and Atlantic Properties Group, Inc. as their interests appear, and against Defendants, David H. Deibler and Carrie J. Deibler, and their employees and agents as to the lands described in Exhibit "A" and depicted on Exhibit "B" in the Petition, being the same lands and premises conveyed to The Olde Dinner Bell Inn, Inc. in Deed Record Book 1063, Page 161, *et seq.*

3. The Court further orders Defendants, David H. Deibler and Carrie

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J. Deibler to leave on the premises for which this Writ of Possession is being issued all personal property which is the property of The Olde Dinner Bell Inn, Inc.

4. This Writ is being executed as of the date hereinabove indicated and shall be and is effective in accordance with its terms and conditions as of the date hereinabove written.

5. Plaintiffs are hereby awarded the costs of this action.

/s/ T. H. GRAVES

Judge